

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2052

To be argued by:
GEORGE C. MANTZOROS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-2052

UNITED STATES OF AMERICA ex rel.
RICHARD LABELLE,

Appellant,

-against-

THE HONORABLE ROBERT J. HENDERSON, Super-
intendent of the Auburn Correctional
Facility,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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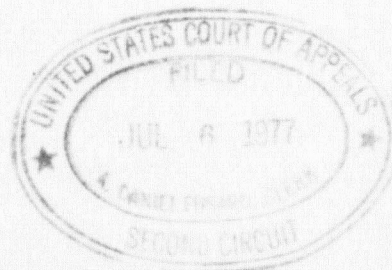


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Preliminary Statement

Petitioner-appellant, Richard LaBelle (herein-
after referred to as petitioner), appeals from a decision
and order* of the United States District Court for the

* The District Court refers to the Records on Appeal
(24 A D 2d 350 [1966], 18 N.Y. 2d 405 [1966] and 37 A D 2d
628 [3d Dept. 1971]) which the undersigned has reviewed in
the law library of the New York County Lawyers Association.

Northern District of New York (Port, J.) dated March 8, 1977, denying his petition for a writ of habeas corpus on the ground that the "petitioner's contention is foreclosed by Stone v. Powell [428 U.S. 465]" and because the "petitioner has had not only the 'opportunity' for, but the actuality of a full and fair litigation of his Fourth Amendment claim."

Petitioner, by his attorneys, alleged in his petition prepared prior to the decision of Stone v. Powell, supra, that he was detained "in violation of his rights under the Fourth and Fourteenth Amendments to the Constitution of the U.S. as construed by the Supreme Court of the U.S. in Wong Sun v. United States, 371 U.S. 471 (1963) and Brown v. Illinois, 95 S. Ct. 2254 [1975])."

In 1964, petitioner and his brother Edward LaBelle were jointly indicted in connection with the murder of a "15-year-old girl" on November 28, 1963, and "[b]oth brothers were arrested under similar circumstances, similarly detained, questioned and arraigned and subsequently tried jointly" (People v. LaBelle, 24 A D 2d 350, 351 [App. Div. 3d Dept. 1966])). This Court has previously reviewed two

of the prior trials in United States ex rel. Edward LaBelle v. Mancusi, 404 F. 2d 690 (1968) Lumbard, C.J., Friendly and Ryan, J.J.); including the 1964 trial, United States ex rel. Edward LaBelle v. LaVallee, 517 F. 2d 750, 753 (1975) (Hays, Gurfein, Van Graafeiland, J.J.) (Court held that Edward LaBelle's "arrest, although made pursuant to an invalid warrant is nonetheless lawful because it was supported by probable cause independent of the defective warrant").

In this appeal, petitioner seeks to side-step the application of Stone v. Powell, and this Court's decision in United States ex rel. Edward LaBelle v. LaVallee, supra, upon his selective and piece-meal record ("Extracts From State Court Proceedings") ("First Trial Transcript" 198-199, 218, 233-234, 417), contending "he was not allowed to elicit testimony regarding the police investigation prior to his arrest [about 10:15 A.M. December 3, 1963]" which would show "what the police knew and when they knew it" (Br. p. 10), by omitting evidence of his identification by his brother at 8 to 8:15 A.M. as his passenger on the night of the murder on November 28, 1963 which was made in the presence of the arresting officer

(Bardossi, Record, 18 N.Y. 2d 405, p. 191) (Edward LaBelle's motion and Huntley hearing with cross-examination by petitioner's attorney; see testimony of witnesses Keating [914-915, 998]; Brandon [956-957])).

Questions Presented

1. Whether or not Senior Investigator Bardossi who was present on December 3, 1976 at 8-8:15 A.M. when co-defendant Edward LaBelle identified petitioner as the passenger in his car (License Plate MT-9451) on the night of November 28, 1963, in conjunction with other information known to the police, had probable cause - even without a warrant - to arrest petitioner for the felony of assault in the second degree (§ 242[5] Penal Law) and attempted kidnapping (§ 1250[1][2] Penal Law) allegedly committed upon Mary Catherine Dolan (See affd. petitioner's Exhibit 6 in Extracts From State Court Proceedings).

2. Whether or not the United States District Court properly dismissed the Petition under 28 USC § 2254, where petitioner had not only the opportunity for, but actually did object at trial and on direct review in the

State courts to the admissibility of his statement on the ground that it was made following an alleged invalid "John Doe" misdemeanor arrest warrant and without probable cause.

Statement of the Case

A. The Petition

Petitioner contends that his 1969 "conviction was based upon a confession obtained - upon the minutes in his second trial in 1969 - as a result of an illegal arrest in violation of his Fourth and Fourteenth Amendment Rights" and alleges his version of certain "facts and circumstances of this illegal arrest and 'tainted' confession" (Pet. par. 5). He alleges that he was arrested at 10:00 A.M. on a "John Doe" warrant charging him with third degree assault on a Mary Dolan, a charge upon which he was never arraigned; that the arrest warrant was issued solely on an information signed by a detective who had no personal knowledge of the alleged assault; that although Mary Dolan had signed an affidavit on December 2, 1963, indicating that two men had tried to grab her and force her into their car four days previously, it was not presented to the court in issuing

the arrest warrant; and that the "trial court concluded as a matter of law that the warrant was invalid under New York Law and so charged the jury" (Pet. par. 5a). He further alleges, apparently referring only to the minutes of the second trial in 1969 (Pet. par. 5b):

"b. The de[f]ective warrant was then executed by two other officers who had no personal knowledge of the alleged assault and no additional personal information concerning the alleged assault. In fact the trial record shows that they did not even know the name of the complainant and the record furnished no evidence of other information known to the arresting officers which could have independently established probable cause."

Petitioner then narrates his version of the circumstances in 1963 relating to his detention and statement (Pet. par. 5 subds c-e) and he alleges (Pet. par. 5 subd. f):

"f. The oral statements obtained thirteen hours after the alleged arrest and based on a defective warrant, were admitted in evidence, d[e]spite the defense attorney's objections. The trial judge at the second trial charged that the warrant was unlawful and that the arraignment was illegally delayed. He instructed the jury to consider these two factors in determining the voluntariness of the confession. The independent

Fourth Amendment objection made by petitioner's attorney, that confessions obtained after illegal arrests are tainted 'fruits' of the primary illegality and must be excluded, was ignored by the trial court. This objection was also unsuccessfully raised on appeal."

Thus, he contends, that "[e]ven though the statements may have been voluntary, there was never any showing that the taint of the illegal arrest, which permeated the statements, had been dissipated and that the requirements of the Fourth Amendment were not satisfied. (See Brown v. Illinois, 422 U.S. 590, 95 S. Ct. [1975])* * *" (Pet. par. 6 subd. c).

In his application for a certificate of probable cause annexed to the Notice of Appeal dated April 5, 1977, petitioner alleges that (1) his 1969* "conviction was constitutionally infirm because it was based upon a confession which was obtained as a result of an illegal arrest* * *"; and (2) he was "not provided 'an opportunity for a full and fair litigation of his Fourth Amendment claim' as required by Stone v. Powell, [428 U.S. 465]

* Retrial on remand: People v. LaBelle, 18 N.Y. 2d 405 (1966 rev.'g. 24 App. Div. 2d 350 (3d Dept. 1966)).

[1976] since the state court simply overruled the Fourth Amendment objection and the state appellate court* found the claim to be without merit, with no statement of either factual or legal grounds. (See Gates v. Henderson, Docket No. 76-2065 at p. 1354) (2d Cir.; Jan. 12, 1977)."

In his two-pronged collateral attack on his conviction to circumvent and by-pass Stone v. Powell and the probable cause of his co-defendant's arrest in United States ex rel. Edward LaBelle v. LaVallee, supra (517 F. 2d 750), alleging he was not provided a full and fair opportunity to litigate his Fourth Amendment claim (Br. p. 8 et seq.) and calling for a "hearing* * * on whether there was probable cause for petitioner's arrest without a warrant" (id. p. 20 et seq.), petitioner relies upon his selective "Extracts From State Proceedings." Petitioner's summary of State Court Proceedings" (Br. p. 5-7) is limited to the evidence disclosed in his Huntley hearing - omitting the co-defendant's Huntley hearing in the first trial (Record 18 N.Y. 2d 405 p. 897-996). He now contends (Br. p. 10):

* People v. LaBelle, 37 A D 2d 653 (3d Dept. 1971) leave to appeal denied ____ N.Y. 2d ____ (unreported 1971). Petitioner omits the decision rejecting his "contentions" that his "statements were inadmissible, without reference to voluntariness, since they followed an illegal arrest" citing the decision in 24 A D 2d 350 (1966).

"Moreover, the pre-trial 'fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing.' Townsend, 372 U.S. supra at 313). Although petitioner was allowed to develop testimony concerning the issuance of his arrest warrant (first trial 428-441), he was not allowed to elicit testimony regarding the police investigation prior to his arrest due to the narrow scope of the hearing (first trial 198-199, 212, 233-234, 417). This testimony would have been highly probative of the issue of probable cause for a warrantless arrest, i.e. what the police knew and when they knew it (cf. Morales v. New York, 396 U.S. 102 [1969]).

B. The State Trial and Appellate Records Showing Probable Cause for Petitioner's arrest

On November 30, 1963, the body of 15-year-old Rosemary Snay was found in a culvert in the Town of Schaghticoke, Rensselaer County (Record 37 A D 2d 658 [1971] p. 659). Her father said she left home on November 28, 1963, at about 7 o'clock P.M. and did not return home that night, and that she wore "plaid sneakers" (id. p. 170-171) admitted in evidence (Exhs. 42,43) upon identification by petitioner t. Brandon on August 25, 1964 (307). Two witnesses observed two men -

identifying petitioner and his brother - who approached Rosemary Snay between 7 and 8 o'clock P.M. on November 28, 1963 (id. [Murray] 202, 208; [Huneau] 222-225); other witnesses saw petitioner and his brother later that evening about 10:30 to 11 o'clock P.M. (id. [Smith] 215-216; [Barsey] 237-238).

On December 2, 1963, Mary Catherine Dolan - age 14 - reported to the State police an incident occurring after 7:15 P.M. November 28, 1963, described in her signed statement ("Extracts From State Court Proceedings: Defendant Richard LaBelle's Exhibit 6"). (See also United States ex rel. Edward LaBelle v. LaVallee, supra, 517 F. 2d at 751-752). In summary, she there stated that as she walked toward her home "an old grey car drove past real slow" and that a blond headed man * * * walked up to me and grabbed me by the collar of my coat and said 'Get in the car'" who later again "walked up behind me, grabbed me by the arm and said "Get in the car, your going for a ride" and she replied "I said no, to leave me alone* * *". She identified the car with "license plate number which was MT-9451" to one of her friends "Richy Smith" and they "chased the old grey

car into Cohoes" and pulled alongside it at a red light. She then described the two men. At the trial' Richard Smith identified Edward LaBelle whom he had known previously and petitioner "seated in the passenger seat" (id. 188). Mary Dolan (married name Mary Combs) testified at the second trial (id. 417-445) and she identified petitioner (id. 418). On the basis of Mary Dolan's statement, Lt. Brandon telephoned Detective Leo Barry on December 2, 1963, to apply for two "John Doe" arrest warrants (id.303).

The next morning, December 3, 1963, at about 8:15 A.M. Lt. Brandon delivered the warrant (id. 315) to Senior Investigator Bardossi (id. 273) with instructions to "arrest Richard [LaBelle]" (id. 271, 315). Bardossi, accompanied with Garrett (id. 271), executed the warrant (id. 463) and arrested petitioner.

Petitioner's alleged missing link - "what the police knew and when they knew it" (Br. p. 10) - is found in the undisputed evidence^{1N} defendants' separate Huntley hearings in the first trial in 1964 in which petitioner's attorney participated and cross-examined witness (Record 18 N.Y. 2d 405 [petitioner] 185-351; [Edward LaBelle] 897-965).

Investigators Keating and Garrett had arrested Edward at about 7:20 A.M. December 3, 1963 (910) and brought him to the East Greenbush station arriving at 8:00 A.M. (912). Lt. Brandon and Bardossi who later arrested petitioner entered the room (913). Investigator Keating testified that in their presence, Edward LaBelle admitted that he and petitioner were together the night of November 28, 1963 (914):

" The Witness:* * *later in the afternoon at approximately 5 o'clock he and his brother Richard had left the residence of his sister in Edward's car* * *and had driven to the City of Troy and also the City of Cohoes* * *."

* * *

"The Witness:* * *that they had stayed together throughout the late afternoon and all during the evening of November 28th and I believe after midnight* * *"

* * *

"The Witness: That they had been together until at least 11 o'clock on the evening of November 28th* * *"

Investigator Keating further testified (915):

"The Witness:* * *it is my recollection at this time that Senior Investigator Bardossi pursued the conversation more specifically. The fact was brought out that both were in the vehicle"

and again later in the trial (938):

"A.* * * He did state that he and Richard were together from approximately 5:00 P.M. until somewhere about 11:00 P.M. on that date, both being together in the 1954 Chevrolet which was owned by Edward."

Lt. Brandon testified that he had a conversation with Edward LaBelle in the presence of Investigators Bardossi and Keating "between 8, 8:15, December 3rd, A.M." (957), that Edward "advised me that he was alone with Richard throughout the entire evening" (957) and that he "recalled seeing a girl on the street, and this was all he recalled about this young lady." See also, R. 1046-1048.

Following this identification of petitioner, Lt. Brandon "gave* * *Senior Investigator Bardossi a warrant and directed him to execute the warrant in the City of Troy" (958). It is noted that during petitioner's preliminary hearing, Senior Investigator Bardossi testified he was present at the East Greenbush substation on December 3,

1963, at about 8:00 A.M. and that Lt. Brandon gave him a warrant at about 8:15 A.M. when he left with Investigator Garrett (241).

C. The Appellate Records Disclose that Petitioner's Fourth Amendment Claim was Briefed and Presented for State Appellate Review

The trial records disclose that petitioner had an opportunity for a full and fair litigation of his Fourth Amendment claim at trial and on direct review in the State courts. Notwithstanding petitioner's repeated objections to the admissibility of his statement, including, his "Fourth Amendment claim" * * * raised on three occasions in petitioner's first trial" (Br. p. 12), in the Court of Appeals "(Ct. of Appeals Brief Pt. VII B-2, 59)" (18 N.Y. 2d 405 [1966]) (Br. p. 15) and again during the second trial (Br. p. 16) and appeal (Br. p. 18) (37 A D 2d 658 [3rd Dept. 1971]), he now seeks to avoid the application of Stone v. Powell which admittedly "requires dismissal of this petition if petitioner had 'an opportunity for a full and fair litigation of a Fourth Amendment claim' * * * 'at trial and on direct review' * * * " (Br. p. 8).

Petitioner moved for a pre-trial hearing for a "pre-trial determination as to the voluntariness of a written statement and/or confession" (Record 18 N.Y. 2d 405, p. 160 et seq.). The Court denied the motion on October 2, 1964, and held that the statements were made "freely, voluntarily, uncoerced and without duress* * *and that no constitutional right of the defendant was violated," (See minutes p. 185-553 and opinions 44 Misc 2d 324 and 327 [1964]). At one point during the hearing, petitioner's attorney argued his "position" (id. p. 417) that "if the original arrest under the warrant* * *was tainted with any type of illegality, be it jurisdictional or otherwise, that taint will run to the voluntariness* * *and* * *anything obtained from him during the period of the illegal detention would be illegal and without warrant in law."

Petitioner's attorney participated in the examination of the police officers during his co-defendant Edward's evidentiary hearing prior to the admissibility of his statements (Record 18 N.Y. 2d 405, p. 897-998) when, it was disclosed that at about 8:00 to 8:15 o'clock A.M., December 3, 1963, prior to petitioner's arrest about 10 o'clock A.M. on December 3, 1963, Edward LaBelle had

identified petitioner to Lt. Brandon and the arresting officer, Investigator Bardossi, as the passenger in his car on the night of November 28, 1963 (Record [Keating] 914-915, 938; [Brandon] 957).. Later during the trial, petitioner's attorney requested voire dire "to preliminarily examine" Investigator Bardossi "on the question of voluntariness" (R. 1168) and over the District Attorney's objection, he was permitted to examine the witness as to his knowledge of the factual background of the issuance of the warrant (R. 1171-1172), as follows (R. 1172):

"Q. How did you know that Richard LaBelle was possibly involved in the incident?

A. Through my conversation with Lieutenant Brandon, and he informed of the background.

Q. The only knowledge you had was an affirmation by Mr. Brandon, right?

A. That's correct.

Q. And that was a short conversation, I assume, in the early - at 8:00 o'clock at the East Greenbush Barracks on December 3, 1963?

A. Yes."

Objections to the admissibility of the petitioner's statement were also made in the motion to dismiss (R. 1582,

1593-4) to which the District Attorney responded by reference to the "oral admissions of Edward* * *and Edward says, 'I was with my brother all night'* * *" (R. 1596).

In his appeal to the Supreme Court, Appellate Division, which affirmed the first judgment of conviction, People v. Richard LaBelle, 24 A D 2d 350 [3d Dept. 1966]), as well as the second judgment (37 A D 2d 658, 660) (note: Court cited "24 A D 2d 350"), petitioner argued that the police had issued a sham warrant to interrogate him for another crime (Br. Point II B-2, p. 28, Point VII - 3, p. 68) (see Br. p. 14). But petitioner again omits from his record here the District Attorney's response reciting the evidence of probable cause for the arrest (Resp. Br. p. 4):

"Inspector Donald G. Brandon, of the State Police, testified he interviewed Edward LaBelle at the sub-station and ascertained that he had been with his brother Richard all evening on November 30 (1947); that he ordered Investigators Bardossi and Garrett to Troy to arrest Richard LaBelle (1048)."

Petitioner presented and briefed his Fourth Amendment claim citing Wong Sun v. United States, 371 U.S. 471, in his appeal to the Court of Appeals

("Defendant-Appellant's Brief" Point VI, p. 63) (People v. LaBelle, 18 N.Y. 2d 405 [1966]). The District Attorney responded by referring to the co-defendant Edward's admissions which disclosed the arresting officer's knowledge and probable cause to arrest petitioner (R. Respondent's Brief, p. 28):

"Armed with these warrants, the police arrested and interrogated Edward F. LaBelle, admittedly the registered owner of the automobile bearing the license number supplied to the police by the Dolan girl. He admitted that he had been driving the automobile the evening of the alleged assault and stated that this appellant [Richard LaBelle], and he alone, had been with him the entire time. He even stated that appellant had gotten out of the automobile and he recalled seeing 'a girl on the street at that time'" (pp. 10-1048).

"It was not until they had secured this information from Edward that the police executed the assault warrant by arresting appellant (1048). The People submit that this information, supplied to them by Edward LaBelle, was sufficient to identify the 'John Doe' named in the assault warrant as this appellant, and the police thereupon had probable cause to execute the warrant and arrest appellant. The arrest was not illegal, nor was it a sham. It was a legal arrest upon a warrant fair and valid on its face.

* * *

"The situation in the case at bar is entirely different and the 'Wong Sun doctrine' is not applicable."

The Court of Appeals reversed the judgment of conviction and ordered a new trial on the felony murder count because the trial court allowed in evidence "only a redacted version of the [petitioner's] statement, with practically all references to Edward deleted" (People v. LaBelle, supra, 18 N.Y. 2d at 410) (5-2 decision). Its order for a new trial was tantamount to an affirmance of the existence of probable cause and the admissibility of the "entire" statement including its exculpatory parts. See Argument, *infra*, p. 25-26.

Upon remand, the County Court denied petitioner's motion in 1967 for a new pre-trial hearing which only called for a hearing "as to the voluntariness and/or admissibility of any statements and/or confessions" (R. 37 A D 2d 651 [Notice of Motion] p. 73-74) - a "motion* * *for an Escobeda-Miranda* * *hearing" (*id.* p. 76) - which Justice McCall denied on the ground that "[t]his Court takes recognition of the fact that on final appeal, the previous decision as to voluntariness was affirmed and that therefore,

there is no need for a new voluntariness hearing nor is the defendant entitled to one" (id. p. 90).

In his appeal to the Appellate Division which affirmed the second judgment of conviction (People v. Richard LaBelle, 37 A D 2d 651 [3d Dept. 1971]), petitioner argued in Point VII of his brief that the "pre-arraignment oral and written statements were inadmissible, without reference to voluntariness" and that the "warrant was void and no probable cause existed." The Court held (37 A D 2d at 669):

"* * *There is no merit to appellant's contentions that pre-arraignment oral and written statements were inadmissible, without reference to voluntariness, since they followed an illegal arrest.
* * *Furthermore, these contentions were raised and rejected by this Court when appellant's first conviction was before as for review. (People v. LaBelle, 24 A D 2d 350)."

ARGUMENT

BOTH STATE COURT TRIAL AND APPELLATE RECORDS DISCLOSE THAT PETITIONER'S FOURTH AMENDMENT CLAIM WAS BRIEFED AND PRESENTED FOR REVIEW INCLUDING JUDICIAL CONSIDERATION OF THE EVIDENCE SHOWING PROBABLE CAUSE PRIOR TO THE ARREST WHEN PETITIONER WAS IDENTIFIED TO THE ARRESTING OFFICER AS THE PASSENGER IN THE CAR.

* Attention is invited to the recitation of evidence of probable cause in District Attorney's Brief p. 4, supra, p. 17(R. 24 A D 2d 350).

The District Court correctly denied and dismissed the petition for a writ of habeas corpus on the ground that the "petitioner's contention is foreclosed by Stone v. Powell [428 U.S. 465]" because the "petitioner herein had not only the 'opportunity' for, but the actuality of a full and fair litigation of his Fourth Amendment claim" (Memorandum - Decision and Order [NDNY 76-CV-182]).

Stone v. Powell, supra, held (428 U.S. at 494) that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial" and it further explained (428 U.S. at 495 f.n. 37):

"* * *In sum, we hold only that a federal court need not apply the exclusionary rule on habeas corpus review of a Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review. Our decision does not mean that the federal court lacks jurisdiction over such a claim, but only that the application of the rule is limited to cases in which there has been both such a showing and a Fourth Amendment violation." (Emphasis added)

The trial and appellate records of both trials in 1964 (People v. LaBelle, 24 A D 2d 350 [3d Dept. 1966]; 18 N.Y. 2d 405 [1966]) and 1969 (People v. LaBelle, 37 A D 2d 658 [3d Dept. 1971]) (p. 660: Citation of "24 A D 2d 350") - both linked on the issue of probable cause, are, therefore, here relevant and admissible under the federal court's "plenary power" (Townsend v. Sain, 372 U.S. 293, 312, 322 [1963]; Glick v. Erickson, 488 F. 2d 182, 183-184, 185 f.n. 2 "the federal courts are entitled to examine the entire record in cases of this kind* * *and are not limited solely to a review of the record on trial" [8th Cir. 1973]; United States ex rel Gaugher v. Brierley, 477 F. 2d 516, 525 [3d Cir. 1973]) - establish not only the opportunity, but evidence of actual cause for the arrest: that prior to petitioner's arrest on December 3, 1963, at about 10 o'clock A.M. (Pet. par. 5 subd. a.), petitioner's brother Edward had identified petitioner and admitted to Lt. Brandon and Senior Investigator Bardossi, the arresting officer, that he and "his brother Richard" had been together" between 5 to 11 o'clock on November 28, 1963 (R.[Keating] 914-915, 938; [Brandon] 957, 1046-1048). Following petitioner's identification, Lt. Brandon "gave* * *Senior Investigator

Bardossi a warrant and directed him to execute the warrant in the City of Troy" (R. 958). Senior Investigator Bardossi removed the warrant from his pocket and arrested petitioner (R. [Keating] 191; [Bardossi] 242). Petitioner's attorney, who represented him in both trials, examined Senior Investigator Bardossi on his knowledge based on his "conversation* * * at 8:00 o'clock at the Greenbush Barracks on December 3, 1963" (R. 1171-1172). During the second trial, petitioner's attorney again examined the police officers on voire dire on the subjects of the issuance of the warrants, petitioner's arrest, detention and statement (e.g. R. 37 A D 2d 653 [Garrett] 273-284; [McCarthy] 287-297; [Brandon] 301-325, 333-343; [Bardossi] 453-462; 464-480)) but without inquiry of the arresting officer Bardossi's knowledge and petitioner's identification by his brother Edward prior to the arrest at 10 o'clock A.M. on December 3, 1963 which he already knew from the evidence in the hearings in the first trial in which he participated.

Significantly, the Supreme Court, Appellate Division, Third Department, which had obviously considered the District Attorney's recitation of the evidence of probable cause for

the arrest (R. 24 A D 2d 350, Resp. Br. p. 4) (supra, p. 17), again rejected petitioner's argument in his appeal from the second judgment of conviction in 1969 that (Appellant's Br. Point VII) the "prearraignment oral and written statements were inadmissible, without reference to voluntariness" and that the "warrant was void and no probable cause existed", and held (People v. LaBelle, 37 A D 2d 658, 660 [1971]):

"There is no merit to appellant's contentions that pre-arraignment oral and written statements were inadmissible, without reference to voluntariness, since they followed an illegal arrest. Nor is there merit in his contention that the pre-arraignment, oral and written statements were involuntary as a matter of law. Furthermore, these contentions were raised and rejected by this Court when appellant's first conviction was before us for review. (People v. LaBelle, 24 A D 2d 350)." (Emphasis added).

Petitioner overlooks that in response to his Fourth Amendment claim in his appeal to the Court of Appeals (People v. LaBelle, 18 N.Y. 2d 405 [1966]), Defendant-Appellant's Brief, Point VI, citing Wong Sun v. United States, 371 U.S. 471 [p. 63]), the District Attorney had again recited petitioner's identification by Edward prior to the arrest (Respondent's Brief p. 28):*

* Omitted from petitioner's "Extracts from State Court Proceedings."

"Armed with these warrants, the police arrested and interrogated Edward F. LaBelle, admittedly the registered owner of the automobile bearing the license number supplied to the police by the Dolan Girl. He admitted that he had been driving that automobile the evening of the alleged assault and stated that this appellant, and he alone, had been with him the entire time. He even stated that appellant had gotten out of the automobile and he recalled seeing 'a girl on the street at that time' (pp. 1046-1048)."*

Petitioner cannot so cavalierly attempt to circumvent Stone v. Powell, supra, and the persuasive evidence of probable cause for his arrest by his contention that the "Court of Appeals did not give the claim full consideration, if it gave it any at all, since it reversed on other grounds" (Br. p. 15). In its order for a new trial solely on the ground that the trial court allowed in "evidence only a redacted version of the statement, with practically all references to Edward deleted" which "also eliminated those portions of the statement tending to exculpate Richard" (People v. LaBelle, supra, 18 N.Y. 2d at 410), the Court of Appeals - obviously upon the District Attorney's recitation

* For the remainder of the quotation, see "Statement C, supra, at pp. 18-19.

of the evidence of petitioner's identification by Edward prior to the arrest constituting probable cause - rejected petitioner's Fourth Amendment claim and held the "entire" statement legally admissible when it observed (18 N.Y. 2d at 410):

"If there had not been a joint trial, Richard LaBelle would have been entitled to have his entire statement, including the exculpatory portions, put in evidence, rather than this warped version of what he had told the State police* * *".

Justice Bergan, dissenting in part, observed (18 N.Y. 2d at 414):

"It is the effect on appellant's case of this exclusion which leads this Court to hold the joint trial was prejudicial. But this appellant did not object on the trial to excluding the exculpatory portions of his confession from the jury. In any event, those portions were sufficiently placed before the jury on the cross-examination of a prosecution witness."

Thus, petitioner's contention that he was not afforded an "opportunity" - which he mistakenly defines, by transposing the word "opportunity", as a "full and fair

opportunity to litigate his Fourth Amendment claim" (Br. p. 8) - because the state trial and appellate courts "did not make any underlying determinations relevant to petitioner's Fourth Amendment claim" (Br. p. 12), is frivolous and not persuasive. The Supreme Court's rationale in Stone, supra, casts doubts on petitioner's restrictive gloss on the broad language "opportunity for a full and fair litigation of a Fourth Amendment claim" (428 U.S. at 494). The Fourth Amendment claim - and the evidence of probable cause - was briefed and presented in appellate review. In Losinno v. Henderson, 420 F. Supp. 380 (S.D.N.Y. 1976) (Weinfeld, J), the Court rejected a parallel interpretation of Stone v. Powell, supra, that "Stone is no bar to federal habeas corpus relief because the state appellate courts 'remained silent' with respect to [a petitioner's] Fourth Amendment claims" since the "appellate records make it clear that the constitutional claim was briefed and presented for review" and because (420 F. Supp. at 382):

"* * *There is, of course, no requirement that a court write an opinion touching on every contention raised by an appellant. That the

appellate courts rejected petitioner's constitutional claims without specifically addressing each one does not indicate that he was denied a full and fair opportunity to litigate them or that that they were not fully considered* * *."

Significantly, the Supreme Court, Appellate Division, Third Department, in 1971, affirmed the second judgment of conviction (37 A D 2d 658, 660) not only upon consideration of petitioner's Fourth Amendment claim in his brief, but also because one of the "contentions" was raised and rejected by this Court when appellant's first conviction was before us for review. (People v. LaBelle, 24 A D 2d 350)", where the Record in the first trial in 1964 contained evidence of probable cause for petitioner's arrest which was also recited in the District Attorney's Brief (Resp. Br. p. 4). Consequently, the Appellate Division in 1971 (37 A D 2d 658, 660) did, in fact, determine and reject petitioner's Fourth Amendment claim.

Petitioner's other contention that the "record before the Appellate Division did not contain evidence on whether there was probable cause to make a warrantless arrest" (Br. p. 15) and that his "opportunity to fully litigate his Fourth Amendment claim was foreclosed at the

outset of his second trial* *" (Br. p. 16) referring to Justice McCall's decision denying a motion for a new pre-trial hearing (R. 37 A D 2d 658, p. 88-90) solely requesting an "Escobeda* * *Miranda* * *hearing" (See Notice of Motion, id. p. 73-74) because "the previous decision as to voluntariness was affirmed" (id. p. 80) - is similarly without merit. In Denti v. Commissioner of Correctional Services, 421 F. Supp. 557 558-559 (S.D.N.Y. 1976) (Lasker, J.), the Court held that Stone v. Powell, supr applied even where the State Court had remanded "without ordering a further hearing" since the motion had been considered upon a full evidentiary hearing. No reason existed for ordering a new pre-trial hearing upon remand from the Court of Appeals (18 N.Y. 2d 405) which in effect affirmed the admissibility of the "entire statement" including the "exculpatory portions." Besides, probable cause for his arrest had already been established in the evidentiary hearings (1964 trial) when petitioner's brother had identified him to Lt. Brandon and to the arresting officer, Senior Investigator Bardossi - the missing link - "what the police knew and when they knew it" (Br. p. 10). The petitioner's identification to Senior Investigator Bardossi prior to the arrest and the

"collective knowledge of the police", including Lt. Brandon, clearly established probable cause. United States ex rel. Edward LaBelle, supra, 517 F. 2d at 753 (2d Cir. 1975); Beck v. Ohio, 379 U.S. 89, 91 (1964).

This petition vividly illustrates the principles and rationale of Stone v. Powell, supra, which are here applicable (428 U.S. at 491):

"* * *These long-recognized costs of the [exclusionary] rule persist when a criminal conviction is sought to be overturned on collateral review on the ground that a search-and-seizure claim was erroneously rejected by two or more tiers of state courts."

Obviously, no gaps exist in the State judicial opportunities and considerations of petitioner's Fourth Amendment claim as he attempts to show by his piece-meal and selective "Extracts From State Judicial Proceedings" and no evidentiary rehearing is required since the 1964 hearing, here admissible and judicially noticed - omitted and undisputed in petitioner's record - showed that Edward LaBelle had identified petitioner to the arresting officer prior to his arrest, establishing actual cause for his arrest.

CONCLUSION

THE DECISION AND ORDER OF THE
DISTRICT COURT DENYING AND DIS-
MISSING PETITIONER'S PETITION
SHOULD BE AFFIRMED IN ALL
RESPECTS.

Dated: New York, New York
July 7, 1977

Respectfully submitted,

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STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

MARY KO , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for Appellee
herein. On the 6th day of July , 1977 , s he served
the annexed upon the following named person :

JOHN J. CAPOWSKI
BARRY STROM
Cornell Legal Assistance Project
for the Auburn Correctional Facility
Attorneys for Appellant
Myron Taylor Hall
Ithaca, New York 14853

Attorney in the within entitled appeal by depositing
³ copies
a true and correct ~~copy~~ thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by the
Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by him for that
purpose.

Sworn to before me this
6th day of July , 1977

George D. Matthews
Assistant Attorney General
of the State of New York

Mary Ko